MARTIN F. McDERMOTT (SBN 6183307 (IL))
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Tel: (202) 514-4122
Fax: (202) 514-8865

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB, GREAT BASIN RESOURCE WATCH, AMIGOS BRAVOS, and IDAHO CONSERVATION LEAGUE, Plaintiffs, v. STEPHEN L. JOHNSON, Administrator United States Environmental Protection Agency, and MARY E. PETERS, Secretary, United States Department of Transportation, Defendants.	Case No.: 3:08-cv-01409-WHA **DEFENDANTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW** **Hearing Date: June 26, 2008** **8:00 am** **Courtroom 9, 19th Floor**

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Defendants, Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency ("EPA"), and Mary E. Peters, in her official capacity as Secretary of the United States Department of Transportation ("DOT") (EPA and DOT are herein referred to collectively as "Defendants" or the "Agencies"), move the Court to dismiss this case for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Hearing is set for June 26, 2008 on this motion.

Defendants respectfully request that, until this motion to dismiss is decided, all deadlines in this case – including, but not limited to, all initial case management and ADR dates set forth in the Court's March 12, 2008 Order (Dkt. 3) – be stayed.

INTRODUCTION

Plaintiffs – Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League – filed their two-count Complaint on March 12, 2008, alleging that Defendants have failed to discharge certain obligations imposed on them under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. ("CERCLA"). Plaintiffs' First Claim For Relief asserts that EPA and DOT failed to discharge certain "non-discretionary" duties allegedly arising under CERCLA section 108(b), 42 U.S.C. § 9608(b), which, Plaintiffs assert, required the agencies to "prioritize, promulgate, and implement regulations" that would obligate certain facilities involved with hazardous substances to "establish and maintain evidence of financial responsibility" consistent with the degree and duration of risk associated with the facilities' production, treatment, transportation, storage or disposal of such substances. Complt. ¶¶ 37-39. Plaintiffs' Second Claim asserts a closely related "unreasonable delay" claim under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA"), re-alleging that EPA and DOT have failed to "prioritize, promulgate, and implement" regulations governing financial responsibility for facilities involved with hazardous substances. Such inaction, Plaintiffs allege in their Second Claim, constitutes action that is "unlawfully withheld or unreasonable delayed" and therefore "violates" the

APA. Complt. ¶¶ 40-41. Plaintiffs assert that they filed their two Claims in order to "compel defendants to follow the requirements of CERCLA and promulgate financial assurance regulations on a reasonable but rigorous schedule." Complt. ¶ 2.

Plaintiffs allege that venue is proper in this District under CERCLA's citizen suit provision – section 310(b)(2), 42 U.S.C. § 9659(b)(2), which Plaintiffs describe as "allowing but not requiring venue in the District Court for the District of Columbia." Complt. ¶ 4. Plaintiffs also allege that venue is appropriate in this District under the general venue provision for suits against the United States and its agencies and officers – 28 U.S.C. § 1391(e) – because one of the four Plaintiffs (Sierra Club) resides in this District. Complt. ¶ 4. According to the Complaint (¶¶ 7-9), the three other Plaintiffs are based in Nevada, New Mexico and Idaho.

CERCLA section 310(b)(2) requires that a citizen suit alleging that the President or any other officer of the United States has failed to discharge a non-discretionary duty under CERCLA be brought in the United States District Court for the District of Columbia. Accordingly, this Court lacks subject matter jurisdiction over Plaintiffs' First Claim for relief. This Court also lacks subject matter jurisdiction over Plaintiffs' Second Claim, alleging unreasonable delay under the APA, because it can be brought only in the United States Court of Appeals for the District of Columbia Circuit.[1]/ The Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

DISCUSSION

I. STATUTORY BACKGROUND

CERCLA (sometimes referred to as "Superfund") was enacted in 1980 in response to the serious environmental and health risks posed by industrial pollution. See Exxon Corp. v. Hunt, 475 U.S. 355, 358-59 (1986). In brief, liability arises under CERCLA when there has been a release or a threatened release of a hazardous substance at a facility, which causes the incurrence of response

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[1] Because both of the claims asserted in the Complaint are brought in the wrong court, they are also subject to dismissal for improper venue under Fed. R. Civ. P. 12(b)(3).

costs. See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1201 (2d Cir.1992).

Although various provisions in CERCLA vest initial authority in "the President," the President has delegated much of his authority to EPA, as authorized by 42 U.S.C. § 9606. See Exec. Order No. 12,580, § 7, reprinted in 42 U.S.C.A. following § 9615, which delegated authority under the substantive provision implicated in this lawsuit, CERCLA section 108(b). Section 7(c)(1) of the Executive Order delegated authority over transportation-related facilities to DOT and section 7(d)(1) of the Order delegated all other authorities under CERCLA section 108(b) to EPA.

Section 108(b) provides at the outset that "not earlier" than December 11, 1985, the President was to begin to promulgate financial responsibility requirements for classes of facilities involved in the production, transportation, treatment, storage and disposal of hazardous substances. 42 U.S.C. § 9608(b)(1). That subsection provides that the President was to publish a notice in the Federal Register by December 11, 1983, identifying those classes of facilities for which requirements would be first developed, with priority to be accorded to those classes of facilities, owners, and operators presenting the highest level of risk of injury. Id. Subsection (3) specifies that any regulations promulgated under section 108(b) are to "incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event later than 4 years after the date of promulgation." 42 U.S.C. § 9608(b)(3).[2]/

CERCLA section 310, 42 U.S.C. § 9659(a), authorizes citizen suits against the United States under specified circumstances. Plaintiffs' Complaint (¶ 3) relies on section 310(a)(2), which provides that any person may commence a civil action on his own behalf against the President or any other officer of the United States "where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter. . . which is not discretionary with the President or such other officer." (Emphasis added). Subsection (b)(2) of section 310 specifies where venue

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[2] The deadlines set forth in CERCLA section 108(b) raise serious questions about the timeliness of Plaintiffs' claims. However, any statute of limitations or other issues related to the timing of those claims should be addressed by a court with jurisdiction and where venue is appropriate.

lies for a non-discretionary duty case: "Any action brought under subsection (a)(2) of this section may be brought in the United States District Court for the District of Columbia." 42 U.S.C. § 9659(b)(2). (Emphasis added).

Although not directly implicated here, a separate CERCLA provision allows citizen suits when the United States or others are alleged to have "violated" the statute. Section 310(a)(1) authorizes suits "against any person (including the United States and any other governmental instrumentality or agency, . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities)." 42 U.S.C. § 9659(b)(1). Such actions "shall be brought in the district court for the district in which the alleged violation occurred." Section 310(b)(1), 42 U.S.C. § 9659(b)(1).

CERCLA also contains a judicial review provision, section 113(a), which provides that review of any regulation promulgated under the Act "may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia." 42 U.S.C. § 9613(a).

Plaintiffs' Second Claim is founded on APA section 706(1), under which the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

II. BECAUSE VENUE FOR NON-DISCRETIONARY DUTY ACTIONS UNDER CERCLA LIES EXCLUSIVELY IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, THIS COURT SHOULD DISMISS PLAINTIFFS' FIRST CLAIM FOR RELIEF

Venue concerns the appropriate district court in which an action may be filed. See NLRB v. Line, 50 F.3d 311, 314 (5th Cir.1995). "Generally, in order for venue to be proper, it must be proper as to all defendants and all claims." City of Waco v. Schouten, 385 F. Supp. 2d 595, 599 (W.D. Tex. 2005). When a defendant objects to venue under Rule 12(b)(3), the plaintiff bears the burden of establishing that venue is proper. See Chiu v. Mann, No. 02-4590, 2003 WL 716247, at *2 (N.D.

Cal. Feb. 24, 2003); Deputy v. Long-Term Disability Plan of Sponsor Aventis Pharms, No. 02-2010, 2002 WL 31655328, at *1-2 (N.D. Cal. Nov. 21, 2002). See also 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure. § 1352 (3d ed. 2004) (plaintiff properly bears burden of establishing validity of venue selection, as it is "plaintiff's obligation to institute his action in a permissible forum, both in terms of jurisdiction and venue."); Delta Air Lines v. Western Conf. of Teamsters Pens. Fund, 722 F. Supp. 725, 727 (N.D. Ga. 1989) (plaintiff's burden to establish venue because holding otherwise would give plaintiff an "improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue."). In addition to establishing that venue is proper, a plaintiff bears the burden of establishing subject matter jurisdiction. US West, Inc. v. Nelson, 146 F.3d 718, 722 (9th Cir. 1998).

If an action is venued improperly, "a district court must refrain from entertaining the suit and must either dismiss the action or, 'if it be in the interest of justice, transfer such case to any district . . . in which it might have been brought.'" Sauers v. Pfiffner, No. 4-88-457, 1989 WL 47381, at *2 (D. Minn. March 23, 1989) (citing 28 U.S.C. § 1406(a)). Whether dismissal or transfer is appropriate lies within the court's sound discretion. Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993).

There are two types of federal venue statutes: "special" venue statutes and the "general" venue statute, 28 U.S.C. § 1391. Subsection (e) of section 1391 provides that, "except as otherwise provided by law," in a civil action in which a defendant is an officer or employee of the United States, such action may be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved. 28 U.S.C. § 1391(e). The exception in the general venue provision ("except as otherwise provided by law") embodies the well-established rule that special venue provisions are typically intended to control venue of all claims brought under the statutes to which they relate, and a special venue provision controls over general one. See, e.g., Charles A. Wright,

Arthur R. Miller, Edward H. Cooper, 14D Federal Practice & Procedure § 3803 (2007) ("It is now well settled that a special venue statute, expressly identifying the proper venue for a particular kind of action, will control over the general venue statutes found in Sections 1391 through 1393 of Title 28 of the United States Code.").

Finally, because venue for a suit against the United States is a component of sovereign immunity, Phillips v. Rubin, 76 F. Supp. 2d 1079, 1082-83 (D. Nev. 1999), venue provisions such as those found in CERCLA's citizen suit provision are jurisdictional and must be narrowly construed. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 94 (1990). See also Kimberlin v. Quinlan, 774 F. Supp. 1, 10 (D.D.C. 1991) ("The present situation involves a statutory waiver of sovereign immunity; that waiver specifies precisely in which courts venue is proper and the venue provision must therefore be strictly construed.") (rev'd on other grounds, 6 F.3d 789 (D.C. Cir. 1993).

As noted, CERCLA's citizen suit provision contains two special venue provisions. The special venue provision that is applicable to Plaintiffs' First Claim is section 310(b)(2), which specifies that if a citizen believes that a non-discretionary duty has not been discharged by the United States, an action challenging such alleged failure under section 310(a)(2) "may be brought in the United States District Court for the District of Columbia." 42 U.S.C. § 9659(b)(2). By specifying the District of Columbia as the appropriate venue for a case alleging breach of a CERCLA non-discretionary duty, Congress ruled out the filing of such actions in other venue.

This common sense reading of the statute is supported by the legislative history for section 310. See H.R. Rep. No. 99-962 (1986) (Conf. Rep.), reprinted in 6 A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, at 5090 (Comm. Print 1990), where the two different types of CERCLA citizen suits are discussed:

> Venue for actions under this section [310(a)(1)] against persons allegedly in violation of standards, or other requirements of CERCLA, is solely in the district court where the violation occurs; similarly, actions for alleged failures to perform a non-discretionary duty may be brought where the violation occurs, or in the United States District Court for the District of Columbia.

(Emphasis added) Id. It is apparent from this history that Congress contemplated that venue for

CERCLA section 310 citizen suits of whatever nature never lies anywhere other than two places – in the district where the violation occurs or in Washington, D.C. In the context of this non-discretionary duty claim, the two venues are actually one and the same because such a case challenges the President's (or his delegate's) violation of his duty, a "failure to act" that transpired in Washington, D.C.

In the context of the President's alleged violation of CERCLA section 108(b) through his failure to take an action that allegedly is mandated by statute, it makes no sense to claim that such failure "occurred" anywhere other than the seat of government. The President is located in Washington, D.C., as are the heads of the United States Environmental Protection Agency and the Department of Transportation, who are being sued here in their official capacities.[3]/ See 32A Am. Jur. 2d Federal Courts § 1167 (2008) (residence of government officials for venue purposes is their "official" residence, i.e., the "place where the officer performs his or her official duties"). Furthermore, the type of nationally-applicable regulations sought by Plaintiffs in this case would be issued out of those agencies' headquarters.

In any event, the statutory language and the legislative history make clear that section 310(b)(2) assuredly does not locate venue anywhere a plaintiff happens to reside, which is the sole basis for Plaintiffs' contention that it is entitled to file the current action in the Northern District of California.[4]/

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[3] Quite properly the summonses in this case were directed to the EPA Administrator and the Secretary of the Department of Transportation at their addresses in Washington, D.C. See 40 C.F.R. § 1.7(a) (providing that EPA's headquarters are located in Washington, D.C.); §§ 1.21(a), 1.23 (providing that the Office of the Administrator is located within EPA headquarters, and describing the duties of the Administrator).

[4] The nexus between the claims asserted in this case and venue in this District could hardly be more attenuated. None of the relevant actions (or alleged "failures to act," as the case may be) occurred here; the Defendants are not located here; the lead attorney for Plaintiffs is not located here; the two mines cited in the Complaint (¶ 26) as examples of facilities lacking adequate financial assurance are not located here (they are located in Idaho and New Mexico); and only one of the four Plaintiffs

(continued...)

In the most recent case to address this issue, the Second Circuit concluded that CERCLA non-discretionary duty cases can be brought only in the District Court in Washington, D.C. In Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008), a group of people who reside, attend school, or work in lower Manhattan or Brooklyn, brought an action against EPA and EPA officials, claiming they misled the plaintiffs by stating that the air quality in the period after the September 11, 2001 terrorist attacks on the World Trade Center was safe enough to permit return to homes, schools, and offices. The Court of Appeals stated that "the premise" of the Benzman plaintiffs' CERCLA claim "is that EPA failed to fulfill mandatory duties assigned to it by the NCP [National Contingency Plan], which was promulgated under CERCLA." Id. at 133. The Court then noted that the lower court correctly held that the Benzman plaintiffs were required to file such a claim under subsection (a)(2), not subsection (a)(1), of section 310. In upholding the lower court's dismissal of the section 310(a)(1) "CERCLA violation" claim, the Court of Appeals went on to state that "suits under subsection (2) must be brought in the District Court for the District of Columbia, see id. § (b)(2)." 523 F.3d at 133 n.5 (emphasis added). In so concluding, the Second Circuit was in full accord with the lower court. See Benzman v. Whitman, No. 04-1888, 2006 WL 250527, at *29 (S.D.N.Y. Feb. 2, 2006 (CERCLA "restricts venue for actions under subsection (a)(2) to the United States District Court for the District of Columbia. See 42 U.S.C. § 9659(b)") and at *30 ("The appropriate citizen suit provision for the types of allegations made by Plaintiff here is § 9659(a)(2), which limits venue to the District of Columbia.").

This reading of section 310(b)(2) is both natural and logical. In providing that non-discretionary duty suits against the President or his delegate "may be brought" in the District Court in the District of Columbia, Congress intended to provide that a citizen who believes that the federal government has failed to discharge a non-discretionary duty "may commence" an action to challenge

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(...continued)
(Sierra Club) is located here. For venue, Plaintiffs rely entirely on the fact that Sierra Club is headquartered in San Francisco.

that alleged failure and has permission to (i.e., "may") do so in Washington, D.C. Sections 310(a)(2) and (b)(2), 42 U.S.C. §§ 9659(a)(2), & (b)(2). Contrary to Plaintiffs' suggestion (Complt. ¶4), these provisions should not be read to mean that an alleged breach of a non-discretionary duty may be challenged in Washington, D.C. in addition to anywhere else that venue might be proper under the general federal venue provision, 28 U.S.C. § 1391(e), including wherever a self-selected plaintiff might reside.

Plaintiffs' contention appears to be founded on the proposition that "may" is generally considered to be permissive and, thus, section 310(b)(2) was intended to "allow" venue in D.C. in addition to everywhere else allowed by the general federal venue provision. Plaintiffs' contention that section 310(b)(2) does not limit venue but instead expands it beyond the locations otherwise authorized under 28 U.S.C. § 1391(e) makes little sense. Congress would have had no reason to specifically provide for venue in Washington, D.C. in section 310(b)(2) if the legislature intended the general venue provision also to apply to section 310(a)(2) actions. 28 U.S.C. § 1391(e) already provides that, unless otherwise provided by law, venue for actions against the President and other federal officers lies (among other places) where a defendant resides. A provision authorizing citizen suits against the President or any other officer of the United States for breach of non-discretionary duties would already be appropriate in Washington, D.C. because the President and top agency officials reside in Washington, D.C. and a substantial part of the events (or in the context of non-discretionary duty suits, failures to act) will occur where the federal government is headquartered. In short, a holding that the general federal venue provision applies to CERCLA non-discretionary duty suits, as Plaintiffs contend here, would render section 310(b)(2) entirely superfluous.

Venue under section 310(b)(2) has seldom been litigated. Defendants have located only two decisions addressing that provision other than the District Court and the Second Circuit decisions in Benzman discussed above. A third court, the District Court for the District of Kansas, agreed that section 310(b)(2) restricts venue for CERCLA non-discretionary duty suits to the District Court for the District of Columbia. See Davis v. EPA, No. 05-3458-SAC (D. Kans. Jan. 27, 2006)

(Attachment "A," at 3). The only court that has held to the contrary is the Tenth Circuit. In an unpublished decision – which, under Tenth Circuit Rule 32.1(A), is "not precedential" – that court decided, without benefit of any briefing by the United States, that cases brought under CERCLA section 310(a)(2) need not be brought in the District of Columbia. Davis v. EPA, 194 Fed. Appx. 523 (10th Cir. 2006).

The Tenth Circuit's reasoning was threefold. First, it observed that "may" is "permissive, not mandatory." Id. at 525. Second, it stated that "Congressional intent on this point becomes even clearer when one considers the accompanying venue provision for citizen suits against private actors: such suits 'shall be brought in the district court for the district in which the alleged violation occurred,' id. § 9659(b)(1) (emphasis added)." Third, the court stated, "citizen suits against the government have been regularly litigated outside the District of Columbia." Id. at 526 (citing four cases).

Regarding the first point made by the Tenth Circuit, although it is true that "may" is generally regarded as permissive, the meaning of the word is heavily dependent on context. See Webster's Third New International Dictionary 1396 (unabridged), defining "may" to mean "shall, must – used esp. in deeds, contracts, and statutes." See also D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402-403 (1992); ("The standard grammatical use of *may* (permitted) and *shall* (required) is also a legal use, often described as the 'presumed" use. But *may* and *shall* in legal writing, especially in statutes, are so frequently treated as synonyms that the grammatical standard cannot be considered the legal standard."); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("Courts in virtually every English-speaking jurisdiction have held – by necessity – that *shall* means *may* in some contexts, and vice versa.").

With respect to the second point made by the Tenth Circuit, the legislative history reveals that Congress did not contemplate that actions arising under section 310(a)(1) be treated completely differently from actions arising under section 310(a)(2). See discussion supra at 6-7, stating that venue for actions against persons allegedly in violation of CERCLA standards or requirements "is

solely in the district court where the violation occurs; similarly, actions for alleged failures to perform a non-discretionary duty may be brought where the violation occurs, or in the United States District Court for the District of Columbia"). By using the word "similarly," Congress intended to make clear that both provisions should be read to limit venue, not expand it.

With respect to the third point, the Tenth Circuit's statement that citizen suits against the United States "have been regularly litigated outside the District of Columbia" 194 Fed. Appx. at 526, two of the four cases cited as examples were hardly "litigated" – they were dismissed at the outset (on the government's motions) for lack of subject matter jurisdiction. See WorldWorks I, Inc. v. Dep't of Army, 22 F. Supp. 2d 1204 (D. Colo. 1998); Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990). In the other two cases, for whatever reason, venue does not appear to have been raised by any party. In any event, none of the four cited decisions addresses venue under CERCLA.

Locating venue in the District of Columbia for suits against the President or his delegates at federal agencies is not unique to CERCLA. For example, in 2 U.S.C. § 922, Congress provided in the context of emergency powers to eliminate federal budget deficits: "(1) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any order that might be issued pursuant to section 904 of this title violates the Constitution." (Emphasis added.) The fair reading of that provision is that D.C. provides exclusive venue for such actions, not that one can bring an action in Washington, D.C. in addition to every other location where venue might be appropriate under the general venue statute. Congress uses the words "may bring an action in the United States District Court for the District of Columbia " when it intends that certain matters be litigated in the nations's Capital.

The citizen suit provision in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, includes a venue provision similar to CERCLA section 310(b)(2) but that uses somewhat more expansive language. It provides that cases "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" "may be brought in the district court for the district in which

the alleged violation occurred or in the District Court of the District of Columbia." (Emphasis added.) Under Plaintiffs' presumed reading of this provision, venue would lie not only in the two locations specified by Congress, but also anywhere a plaintiff resides. Such a reading renders the statute's special venue provision essentially meaningless.

RCRA's legislative history supports the argument that when Congress provides in a special venue provision that an action "may be brought" in one or more certain locations, it means "can only be brought" there. In discussing RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(2), which uses the same "may be brought" venue language later added to CERCLA in section 310(b)(2), the House Report stated: "Any action that is brought solely against the Administrator can only be brought in the district court where the violation occurred, or in the District of Columbia" H.R. Rep. No. 94-1491, pt. 1, at 69 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6307. There is no suggestion that Congress intended the word "may" in this context to permit venue in these two locations in addition to everywhere else jurisdiction would otherwise lie in the absence of such a provision.

A variant on Congress's use of the words "may be brought" further demonstrates that such phrasing is not intended to expand jurisdiction beyond 28 U.S.C. § 1391(e) but to limit it to the specifically listed venue. In 15 U.S.C. § 146a, for example, Congress provided that, in the context of suits by or against a "China Trade Act Corporation," the federal district courts have exclusive original jurisdiction of all suits to which such a corporation, or a stockholder, director, or officer thereof in his capacity as such, is a party, and that suit against the corporation "may be brought in the United States District Court for the District of Columbia or in the Federal district court for any district in which the corporation has an agent and is engaged in doing business." (Emphasis added.) Such a special venue provision must be read as specifying the two authorized venues for such lawsuits. Under a commonsense reading of this provision, an action filed where a plaintiff resides would be improperly venued unless the plaintiff happened to reside in Washington, D.C. or in a district in which the corporation has an agent and is engaged in doing business.

Plaintiffs would stand on firm ground if CERCLA section 310(b)(2) read: "Any action

brought under subsection (a)(2) of this section may be brought in the United states District Court for the District of Columbia and in any District in which a plaintiff in the action resides." But the provision does not so read, even though Congress knows how to craft such wording. See, e.g., 49 U.S.C. § 44309(b)(1), which concerns certain actions against the United States for certain financial losses: "A civil action under subsection (a) of this section may be brought in the judicial district for the District of Columbia or in the judicial district in which the plaintiff or the agent of the plaintiff resides if the plaintiff resides in the United States." (Emphasis added.)

Under the special venue provision found at subsection 310(b)(2), Plaintiffs First Cause of Action is improperly brought in this District and should be dismissed.

III. JURISDICTION OVER PLAINTIFFS' SECOND CLAIM LIES EXCLUSIVELY IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Plaintiffs' Second Claim for Relief asserts that Defendants have acted "in violation" of the APA, by unlawfully withholding or unreasonably delaying actions that Plaintiffs assert are "required by CERCLA." Complt. ¶ 41. Plaintiffs cite Defendants' alleged failures to "prioritize, promulgate, and implement financial responsibility requirements" for various types of facilities involved with hazardous substances. Id. Because the United States Court of Appeals for the District of Columbia has exclusive jurisdiction over such a claim, Plaintiffs' Second Claim for Relief should be dismissed.

As noted earlier, CERCLA section 113(a) provides that review of any regulation promulgated under the Act "may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia." 42 U.S.C. § 9613(a).

In Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), the D.C. Circuit held that it has exclusive jurisdiction over a claim of unreasonable delay because the agency action sought to be compelled could be reviewed only in the Court of Appeals. The Ninth Circuit in Public Utility Commissioner of Oregon v. Bonneville Power Admin., 767 F.2d 622 (9th Cir. 1985), adopted the D.C. Circuit's holding in TRAC, agreeing that "where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect

the court's future jurisdiction is subject to its exclusive review." Public Utility, 767 F.2d at 626. In the instant case, Plaintiffs' assertion that Defendants have unreasonably delayed action under CERCLA section 108(b) affects the D.C. Circuit's future jurisdiction, because any challenge to final agency action on the petition would be reviewable only in that court. Accordingly, under both TRAC and Public Utility, the D.C. Circuit has exclusive jurisdiction over Plaintiffs' claim of unreasonable delay. See also Maier v. EPA, 114 F.3d 1032 (10th Cir. 1997) (courts of appeal have exclusive jurisdiction over petitions to compel final agency action which would be reviewable only in courts of appeal, thereby ensuring that appellate court will review agency's decision whether ultimate challenge is to failure to revise rule or to decision to revise rule). Id. at 1038-39.

Federal courts are not courts of general jurisdiction; they have only the power authorized by the Constitution and statutes. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). Because subject matter is lacking here, Plaintiffs' Second Claim must be dismissed under Fed. R. Civ. P. 12(b)(1)

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed.[5]/

Dated: May16, 2008

Respectfully submitted,

RONALD J. TENPAS

Assistant Attorney General
Environment and Natural Resources Division

_____/s/_____

MARTIN F. McDERMOTT, Attorney
United States Department of Justice

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[5] Although this Court has authority to transfer improperly venued cases in certain situations, in light of the nature of the jurisdictional problems with Plaintiffs' Second Claim Defendants suggest that the case simply be dismissed. If Plaintiffs still wish to proceed, they can file their claims in the appropriate courts in the District of Columbia.

Of Counsel:

MARY GLEAVES
Office of General Counsel
U.S. Environmental Protection Agency
Pesticides and Toxic Substances Law Office
Ariel Rios Building,
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

THOMAS F. MAHONEY
Office of the General Counsel (C-30)
Rm W 94-312
U.S. Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2008 a copy of the foregoing DEFENDANTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW was filed electronically. Notice of this filing will be sent to each of the parties of record by operation of the Court's electronic filing system.

/s/
Martin F. McDermott, Trial Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JEROME DAVIS,

Petitioner,

v. **CASE NO. 05-3458-SAC**

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

O R D E R

This matter is before the court on a petition for writ of mandamus filed by a prisoner incarcerated in Nebraska. Having reviewed petitioner's limited financial resources, the court grants petitioner leave to proceed in forma pauperis under 28 U.S.C. § 1915.

Petitioner cites a 2003 declaration of a superfund site in Nebraska, for which he states only one company (ASARCO) has thus far been taken to federal court and found liable. Petitioner complains of inaction by the Environmental Protections Agency (EPA) against specific companies (Union Pacific Railroad Company, Aaron Fere & Sons, and Gould Electronics) regarding this superfund site, and seeks a court order requiring EPA to take these companies to federal court to determine each company's financial liability for cleaning up the site. Petitioner states "it is an injustice to allow these responsible parties to continue using their money and power to disrespect the law." The court presumes petitioner filed this action in the District of Kansas because the regional EPA office responsible for execution

of EPA's programs in Nebraska (Region 7) is located in Kansas City, Kansas.

Under 28 U.S.C. § 1361, a United States District court has original jurisdiction of any action in the nature of mandamus to compel "an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." However, the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). To qualify for mandamus relief, a petitioner must establish: (1) a clear right to the relief sought; (2) a plainly defined and peremptory duty on the part of the respondent to do the action in question; and (3) that no other adequate remedy is available. Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990). Although pleadings filed by pro se litigants are to be liberally construed, Haines v. Kerner, 404 U.S. 519, 520 (1972), a court is not "bound by conclusory allegations, unwarranted inferences, or legal conclusions" contained therein, Hackford v. Babbitt, 14 F.3d 1457, 1465 (10th Cir. 1994). A court is not to "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." Whitney v. New Mexico, 113 F.3d 1170, 1175 (10th Cir. 1997). A court's liberal construction of a pro se pleading "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996).

In the present case, the court finds petitioner is not

entitled to the drastic and extraordinary relief being requested. Significantly, no such relief is warranted where the availability of a statutory mandamus remedy exists to require the EPA or other relevant agency to perform a mandatory duty under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) through a citizen suit as authorized by 42 U.S.C. § 9659(a)(2), filed in the United States District Court for District of Columbia, 42 U.S.C. § 9659(b)(2), after proper notice to the EPA Administrator as required under 42 U.S.C. § 9659(e). The court thus denies the application, and concludes the petition should be dismissed without prejudice.

IT IS THEREFORE ORDERED that petitioner is granted leave to proceed in forma pauperis.

IT IS FURTHER ORDERED that petitioner's application for a writ of mandamus is denied, and that this action is dismissed without prejudice.

IT IS SO ORDERED.

DATED: This 27th day of January 2006 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

MARTIN F. McDERMOTT (SBN 6183307 (IL))
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Tel: (202) 514-4122
Fax: (202) 514-8865

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB, GREAT BASIN RESOURCE WATCH, AMIGOS BRAVOS, and IDAHO CONSERVATION LEAGUE, Plaintiffs, v. STEPHEN L. JOHNSON, Administrator United States Environmental Protection Agency, and MARY E. PETERS, Secretary, United States Department of Transportation, Defendants.	Case No.: 3:08-cv-01409-WHA **[PROPOSED] ORDER** **Hearing Date: June 26, 2008** **8:00 am** **Courtroom 9, 19th Floor**

Upon motion by Defendants, Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency, and Mary E. Peters, in her official capacity as Secretary of the United States Department of Transportation, the Court being fully advised in the premises: IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is granted.

Dated: _____

_____
HON. WILLIAM ALSUP
United States District Court